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No. 80-2218

In the Supreme Court of the United States

OCTOBER TERM, 1980

WILLIAM R. COLE, PETITIONER

v.

HENRY B. GRAY, III, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE FEDERAL RESPONDENT IN OPPOSITION

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QUESTION PRESENTED

Whether respondents were entitled to summary judgment in petitioner's suit alleging a conspiracy to deprive him of his constitutional rights under the First, Fifth, and Fourteenth Amendments.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A33-A58) is reported at 638 F.2d 804. The opinion of the district court (Pet. App. A1-A30) is not reported.

JURISDICTION

The judgment of the court of appeals was entered on March 2, 1981 (Pet. App. A62-A64). A petition for rehearing was denied on March 31, 1981 (Pet. App. A59-A61). This petition for a writ of certiorari was filed on June 29, 1981. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

[1] This brief is submitted on behalf of Francis Cummings, the sole federal respondent in this case.

STATEMENT

Petitioner was for many years a nonprobationary employee of the Alabama Military Department and a federally-recognized colonel in Alabama's Army National Guard. He held the permanent merit system classification of Military Executive Officer and served as chief of the Personnel and Administrative Division of the Military Department (Pet. App. A35). After the compulsory military draft was ended in 1971, federal funds were made available to assist the "recruitment and retention" efforts of state National Guards. Petitioner and other officers were compensated from these funds for time spent in recruitment and retention activities (Pet. App. A36).

In October 1975, the Alabama legislature passed a resolution creating a joint interim committee to investigate the use of federal "recruitment and retention" funds in the State. The resolution was introduced by respondent State Senator Fred R. Jones. The committee consisted of three senators, including Jones, and three state representatives, including respondent Alvin Holmes (Pet. App. A36).

The hearings of the interim committee were open to the public and were widely reported by the news media throughout the State. The committee discovered that high-ranking officers in the Military Department, including petitioner, had been paid for a substantial number of extra duty days. During the hearings, Jones stated that funds had been "squandered," and Holmes stated that petitioner had not worked on all the days for which he received pay (Pet. App. A37).

Adjutant-General Charles A. Rollo asked the Commanding General of the First United States Army to conduct a parallel investigation of Alabama Na-

tional Guard practices. Pursuant to this request, respondent Major Francis Cummings was sent from Washington, D.C., to Alabama to prepare a report of inquiry. He spoke with Jones on several occasions during the course of his investigation (Pet. App. A38). The interim legislative committee was dissolved on June 3, 1976 (*ibid.*). Major Cummings' report was filed on September 14, 1976. Cummings found that petitioner: (1) had participated in defrauding the federal government of hundreds of thousands of dollars through his method of authorizing overtime work in the Alabama Military Department; and (2) had received pay for work that apparently was not necessary (Pet. App. A38-A39). At the governor's request, the report was released to the public in March 1977, and thereafter Rollo resigned his post. Respondent General Henry Gray was appointed to succeed him (Pet. App. A39).

Gray spoke with Senator Jones concerning the Military Department's problems. Following these conversations, Gray suspended petitioner, and, on April 20, 1977, dismissed him from his non-probationary merit system position (Pet. App. A39). Gray forwarded to the First Army a request that petitioner be stripped of his federal recognition as a colonel in the National Guard (Pet. App. A39-A40).

Petitioner appealed his dismissal to the Alabama Personnel Board, and, on July 28, 1977, the Board ordered him reinstated. The Board did, however, criticize petitioner's conduct, and it denied him 33 days of salary (Pet. App. A40). Respondent Gray publicly commented that the occasion of petitioner's reinstatement was "a sad day for honesty and integrity in the government" (*ibid.*). Gray reduced petitioner's responsibilities to those of a branch chief

within the Plans, Operations, and Training Division of the Military Department (*ibid.*). At the governor's request, Gray dropped his recommendation that federal recognition of petitioner's rank be withdrawn (*ibid.*).

In March 1978, petitioner filed this suit against Gray, Jones, Holmes, and Cummings in the United States District Court for the Middle District of Alabama. Invoking 42 U.S.C. (& Supp. II) 1983 and 1985, as well as the First, Fifth, and Fourteenth Amendments, he alleged that respondents had conspired to oust him from his position and to damage his reputation. He sought damages for his temporary dismissal and for the allegedly defamatory remarks made by respondents as part of their conspiracy. The district court denied the motions for summary judgment filed by the legislative respondents, Jones and Holmes, but it granted the similar motions filed by respondents Gray and Cummings (Pet. App. A23-A24, A26). Petitioner appealed the latter action, and the district court and the court of appeals, acting in accordance with 28 U.S.C. 1292(b), authorized an interlocutory appeal by Jones and Holmes (Pet. App. A31-A32).

The court of appeals (Pet. App. A33-A58) affirmed the dismissal of the claims against Gray and Cummings. With respect to the summary judgment motions filed by Jones and Holmes, the court reversed and remanded with instructions that the complaint be dismissed as to them as well. The court of appeals held as a matter of law that Gray's actions came within the scope of the qualified immunity recognized in *Scheuer* v. *Rhodes*, 416 U.S. 232 (1974) (Pet. App. A48). Similarly, the court held that "[i]t is manifestly apparent that [Cummings'] actions were taken in good faith, within the scope of his discre-

tion and the responsibilities of his office. * * * Cummings' actions were clearly within the range of the *Scheuer* immunity" (Pet. App. A51). The court also ruled that petitioner's allegations against Jones and Holmes were either unsupported or insufficient to state a claim for relief. Citing *Paul* v. *Davis*, 424 U.S. 693 (1976), the court held that "the loss of a good name, as destroyed by defamation on the part of a public official, is not a 'liberty or property interest' for which [the Reconstruction civil rights] statutes provide protection" (Pet. App. A55-A56). As for petitioner's claim of conspiracy to deprive him of his position, the court stated (Pet. App. A56-A57):

> [T]he evidence does not nearly support a theory of conspiracy * * *. [Petitioner] has shown a possible motive of personal animosity on the part of Jones, but there is not an iota of substantiation for his allegation that he was fired in retaliation for utterances protected by the First Amendment. He has shown minimal contact between the executive and legislative [respondents], with no buttressing proof of the actual nature of the information conveyed. No proof of the making or accepting of statements known to be false exists in the record. Finally, there is the discharge itself. These elements, murky allegations as to motive plus mere contact plus the fact of discharge are linked together by speculation and conclusory allegations.

The court of appeals accordingly concluded that "[t]he evidence was wholly insufficient to raise a fact issue for trial on the conspiracy complaint" (Pet. App. A57).

ARGUMENT

The court of appeals correctly rejected each of petitioner's arguments, and its decision is fully consistent with the holdings of this Court. Petitioner essentially seeks a reconsideration of the factual conclusions reached by the courts below, and further review is not warranted for that purpose.

1. Petitioner first contends (Pet. 23-31) that summary judgment should not have been granted because his complaint and supporting materials raised substantial factual questions involving such subjective factors as motive and intent.

As the court of appeals correctly observed, however, petitioner "has shown minimal contact between the executive and legislative [respondents], with no buttressing proof of the actual nature of the information conveyed" (Pet. App. A56-A57). In order to state a claim of conspiracy under 42 U.S.C. (Supp. II) 1985(3), petitioner must show "some racial, or perhaps otherwise class-based, invidiously discriminatory animus behind the conspirators' action." *Griffin* v. *Breckenridge*, 403 U.S. 88, 102 (1971) (footnote omitted). Petitioner altogether fails to address this criterion. He suggests only that he and the other National Guard officers who participated in recruitment and retention activities were illegitimate targets of respondents' investigations. This is insufficient to satisfy the requirement established by *Griffin* v. *Breckenridge, supra.*

Moreover, petitioner's allegations regarding the existence of a conspiracy are conclusory and not specific. Indeed, when respondent Cummings was sent to conduct the investigation of the Alabama National Guard, he had not previously had any contact with any of the other respondents. Cummings, in fact,

completed his investigation before respondent Gray was appointed, and the two men never met (Pet. App. A48).

Nor is there any evidence that Jones and Holmes were part of a conspiracy with Cummings to injure petitioner. They met to discuss National Guard matters only at a meeting of the interim legislative committee.[2] The court of appeals, therefore, correctly concluded that petitioner's "murky allegations * * * are linked together by speculation and conclusory allegations," and hence are "insufficient to raise a fact issue for trial on the conspiracy complaint" (Pet. App. A57).[3]

2. Finally, petitioner contends (Pet. 50-56) that his First Amendment right "to advocate a strong military defense and to work toward that end" (Pet. 50) was violated by the sanctions that were imposed on him. As the court of appeals concluded, however, "there is not an iota of substantiation for his allegation that he was fired in retaliation for utterances protected by the First Amendment" (Pet.

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[2] Even if such a contact could form the basis for a conspiracy charge, it would be protected by legislative immunity. *Tenney* v. *Brandhove*, 341 U.S. 367 (1951).

[3] Despite his allegations (Pet. 32-37) that certain conversations between Jones and Cummings violated his constitutional rights, petitioner nowhere explains the way in which his rights were affected by these conversations or his rationale for asserting that the conversations were outside the scope of the immunity described in *Scheuer* v. *Rhodes*, *supra*, and *Tenney* v. *Brandhove*, *supra*. Petitioner's further argument (Pet. 38-43) that certain defamatory remarks unconstitutionally infringed a property interest protected by the Fifth and Fourteenth Amendments is without merit. By petitioner's own admission (Pet. 41), the alleged defamatory remarks occurred after his reinstatement and therefore could not possibly have affected his salary or employment.

App. A56). Petitioner cannot invoke the First Amendment to insulate his alleged mismanagement of recruitment funds.[4]

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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[4] Petitioner also takes exception (Pet. 44-49) to the statement of the court of appeals that "the Civil Rights Acts on which this suit was predicated do not make the federal district court a forum for the litigation of every controversy surrounding the loss of property interests through state action. * * * There is no reason and no room for involvement on the part of a federal court" (Pet. App. A57-A58). Contrary to petitioner's assertion (Pet. 45), however, the court did not pronounce a rule barring legitimate claims for relief under the civil rights statutes; it merely observed that petitioner's tort claims for defamation could more appropriately be presented in state court.

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